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To cite this article: Tanja Herklotz (2017) Law, religion and gender equality: literature on the Indian personal law system from a women's rights perspective, Indian Law Review, 1:3, 250-268, DOI: [10.1080/24730580.2018.1453750](https://doi.org/10.1080/24730580.2018.1453750)

To link to this article: <https://doi.org/10.1080/24730580.2018.1453750>



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Published online: 30 Mar 2018.



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# Law, religion and gender equality: literature on the Indian personal law system from a women's rights perspective

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## ABSTRACT

This literature review seeks to portray the scholarship on the feminist critique and women's activism vis-à-vis religion-based family law in India. The key question is: Which aspects of the Indian family law system are problematic from a women's rights perspective and how can these aspects be addressed and reformed? The scholarship on this topic stems from three broad strands of literature: The first looks at family law and jurisprudence from a feminist perspective. It points to discriminatory aspects and suggests particular measures for reform. The second strand comprises studies of legal anthropologists on how women "on the ground" manoeuvre through the intricacies of state law, religious and cultural norms and claims for gender justice. It acknowledges that the Indian State practically shares its authority over law-making and adjudication with various other stakeholders. The third strand of literature is situated in the area of gender studies and deals with the Indian women's movement's activism vis-à-vis the personal laws.

## ARTICLE HISTORY

Received 15 October 2017

Accepted 14 March 2018

## KEYWORDS

Religion; personal laws; feminism; women's rights; legal pluralism; Indian Supreme Court; triple talaq

## Introduction

The Indian Supreme Court's judgement in *Shayara Bano*,<sup>1</sup> wherein the Court declared the Muslim form of divorce by triple *talaq* invalid, and the current debates about a *Talaq* Bill once again demonstrate the actuality of the discourse around personal laws. The case was initiated by five Muslim women and their petitions were supported by a number of Muslim women's rights organizations. A variety of questions featured in the hearings, judgement and the media discourse around the case: Can religion-based personal laws be tested against the fundamental right to equality (Articles 14 and 15 of the Indian Constitution)? Is triple *talaq* protected under Article 25 as an essential practice of Islam? And can the Supreme Court interfere in the matter, or do either the religious communities or the Indian legislature have the authority to amend the personal law system? Not all of these questions were fully and satisfactorily answered by the Court. Thus, even after this landmark judgement, it would appear that key questions remain unanswered in the area of personal laws, making it a contested terrain where not only is

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<sup>1</sup>*Shayara Bano v Union of India and Others* AIR 2017 SC 4609.

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religious freedom played out against gender equality, but these aspects are also intertwined with arguments around identity, nationalism, modernity and secularism.

This literature review seeks to evaluate the scholarship that engages with the Indian personal law system through a gender lens. According to this system, certain family and property matters (marriage, divorce, maintenance, guardianship, adoption, succession and inheritance) of Hindus, Muslims, Parsis and Christians as well as Jews are governed by their respective religious laws.<sup>2</sup> Notwithstanding the debates about a replacement of this system with a Uniform Civil Code (UCC) which date back to pre-Independence times,<sup>3</sup> to date, the personal laws have been maintained and the Constitution's directive principle to "endeavour to secure for the citizens a uniform civil code" (Article 44) remains unfulfilled. Using Gopika Solanki's terminology, this plurilegal system of family law could be described as one of "shared adjudication": the State enjoys only restrained autonomy in this area and willingly splits its adjudicative authority with religious and societal actors and organizations.<sup>4</sup>

The key question that lies at the centre of this review is the following: Which aspects of the personal law system are problematic from a women's rights perspective and how can these problematic aspects be addressed and reformed?

The literature that this overview engages with derives from three broad fields of research. The first strand of literature stems from feminist legal studies and looks at family law and jurisprudence from a feminist or gendered perspective. It deals with those norms among the personal law system that are discriminatory from a women's rights perspective as well as with the shortcomings in the application of personal laws by the judiciary and the executive. An engagement with this scholarship reveals that when positioning themselves on the issue of personal laws, many feminist scholars find themselves facing a conundrum. On the one hand, the fact that personal laws often discriminate against women has led them to criticize these laws as patriarchal and in need of reform. On the other hand, they do not necessarily regard the centralization, secularization and unification of the law as a panacea but also seek to accommodate cultural and religious identity. Broader debates on Third World Feminism,<sup>5</sup> intersectionality,<sup>6</sup> legal universality and cultural relativism play a central role here.

The second strand of literature comprises studies of legal anthropologists on how women "on the ground" manoeuvre through the intricacies of state law, religion-based personal law, sociocultural norms and claims for gender justice. This literature deals with the fact that India is a country where the state "never had and most probably never will have a legal monopoly in the area of family laws",<sup>7</sup> but where its "fractured" and

<sup>2</sup>Buddhists, Jains and Sikhs are counted in the Hindu-category: see for instance, Hindu Marriage Act 1955, s 2(1)(b).

<sup>3</sup>Granville Austin, 'Religion, Personal Law, and Identity in India' in Gerald James Larson (ed), *Religion and Personal Law in Secular India: A Call to Judgment* (Indiana University Press 2001).

<sup>4</sup>Gopika Solanki, *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Gender Equality in India* (Cambridge University Press 2011).

<sup>5</sup>The terminology refers to Mohanty's understanding of Third World women as an "imagined community". Chandra Talpade Mohanty, 'Introduction: Cartographies of Struggle: Third World Women and the Politics of Feminism' in Chandra Talpade Mohanty, Ann Russo and Lourdes Torres (eds), *Third World Women and the Politics of Feminism* (Indiana University Press 1991) 4.

<sup>6</sup>Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] *The University of Chicago Legal Forum* 139.

<sup>7</sup>Mengia Hong Tschalaer, *Muslim Women's Quest for Justice: Gender, Law and Activism in India* (Cambridge University Press 2017) 52.

“partial” sovereignty<sup>8</sup> allows societal institutions to claim authority over adjudication and lawmaking. Scholars in this field apply the concepts of legal pluralism,<sup>9</sup> interlegality<sup>10</sup> and vernacularization<sup>11</sup> to the context of personal laws in India to describe the coexistence of legal systems as well as the large “variety of formal and informal, rural and urban, large and intimate” dispute resolution fora.<sup>12</sup> Drawing on insights gathered during fieldwork in different parts of the country, such as court observations or interviews with women’s rights activists and litigants, the authors depict the advantages and disadvantages of India’s plurilegal landscape.

The third strand of literature deals with the Indian women’s movement’s activism vis-à-vis the personal laws. This scholarship is largely situated in the area of women’s and gender studies and ranges from early seminal works on the Indian women’s movement<sup>13</sup> to more recent engagements with Islamic feminist activism. The field of women’s and gender studies emerged in India in the late 1970s – parallel to the emergence of the Indian women’s movement. In fact, it is sometimes hard to distinguish scholarship on the women’s movement from the movement itself, as in many cases scholars were also active participants of the movement and women’s studies centres have even been described as “[t]he other arm of the women’s movement”, complementing women’s activism “on the ground”.<sup>14</sup> This overlap between research and activism has led to the creation of new knowledge and innovative methodologies in the area of women’s and gender studies.<sup>15</sup> Scholarship in this area highlights how campaigning, awareness raising and approaching the parliament and courts can lead – and has led – to legal (and social) reforms vis-à-vis the personal laws. This literature has much in common with studies that assess the impact of the Global South’s women’s movements on the law – often against resistance from religious communities.<sup>16</sup> A key paradox in women’s rights activism, that Gandhi and Shah formulated in 1992 and which is still of relevance today is the fact that on the one hand, “every campaign in the movement has demanded legal reform”, while on the other hand, the movement has severely criticized “the legal system, the

<sup>8</sup>Shalini Randeria, ‘Entangled Histories of Uneven Modernities: Civil Society, Caste Solidarities and Legal Pluralism in Post-Colonial India’ in Yehuda Elkana and others (eds), *Unraveling Ties: From Social Cohesion to New Practices of Connectedness* (Campus 2002) 308.

<sup>9</sup>John Griffiths, ‘What Is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism* 1.

<sup>10</sup>Boaventura De Sousa Santos, ‘Law: A Map of Misreading. Towards a Postmodern Concept of Law’ (1987) 14 *Journal of Law and Society* 279.

<sup>11</sup>Sally Engle Merry and Peggy Levitt, ‘Vernacularization on the Ground: Local Uses of Global Women’s Rights in Peru, China, India and the United States’ (2009) 9 *Global Networks* 441. The authors define vernacularization as “the process of appropriation and local adoption of globally generated ideas and strategies”.

<sup>12</sup>Srimati Basu, *The Trouble with Marriage: Feminists Confront Law and Violence in India* (University of California Press 2015) 97.

<sup>13</sup>The key examples here are Nandita Gandhi and Nandita Shah, *The Issues at Stake: Theory and Practice in the Women’s Movement in India* (Kali for Women 1992); Radha Kumar, *The History of Doing: An Illustrated Account of Movements for Women’s Rights and Feminism in India 1800–1990* (Kali for Women 1993). In both works, campaigns with regard to the personal laws feature among other aspects of women’s rights activism. Gandhi and Shah point out that “[t]he subject of family or personal laws is probably one of the most complex and sensitive issues in today’s political climate”: Gandhi and Shah (n 13) 229.

<sup>14</sup>Neera Desai, *Feminism as Experience: Thoughts and Narratives* (Sparrow 2006) 68.

<sup>15</sup>*Ibid* 69.

<sup>16</sup>On the legal activism of women’s movements in North Africa, the Middle East and Latin America, see Mulki Al-Sharmani (ed), *Feminist Activism, Women’s Rights and Legal Reform* (Zed Books 2013). On the Moroccan women’s movement, see Amy Young Evrard, *The Moroccan Women’s Rights Movement* (Syracuse University Press 2014).

hopelessness of achieving legal redress, and the endless squabbles with law makers and implementors”.<sup>17</sup>

As this brief overview indicates, this scholarship deals with the personal law system on two different levels: Firstly, it directly engages with the personal laws and those (formal and informal) institutions that interpret, apply and shape these laws (the first and the second strand of literature). Secondly, it indirectly engages with personal laws, when it portrays the Indian women’s movement and individual activists who have sought to reform these laws (the third and to some extent the second strand of literature).

In dealing with the personal laws, the three fields of literature necessarily address different actors that shape the discourse around this topic: “the state” (the legislature, the executive and the judiciary), religious communities, the media and civil society. These actors feature not only in the scholarship’s engagement with the challenges of the personal law system (elaborated in the section on “Contestations around the personal law system: where do the problems lie?”). Here “the state” is critiqued as patriarchal, malfunctioning and avoiding confrontation with the religious communities, and the religious institutions are seen as equally patriarchal and biased against women. The different actors also play a role in the scholarship’s engagement with potential remedies to the ills of the system (elaborated in the “Curing the ills: reform suggestions and women’s rights activism” section). Here the authors point to the responsibilities of the parliament, the courts, the religious communities and civil society, especially women’s rights groups.

A final point that this introduction should mention is that although the personal laws of *all* religious communities are regarded as problematic from a gendered point of view, both in the general discourse as well as in academic scholarship, Muslim personal law plays a special role. In the popular debate, the personal laws of India’s largest minority community (constituting 14.2% of the population) often function as a crucible in which larger conflicts between Hindus and Muslims are played out. While for many Muslims, their personal laws are a crucial marker of minority identity, for some Hindu nationalists, the laws are an example of Muslims being granted a special status in society in which they unjustifiably enjoy more rights than other communities. Scholarship has critically dealt with Muslim personal law provisions, while at the same time attempting to disrupt stereotypes and wrong understandings about Muslim personal law. It has depicted Muslim women’s rights activism and the everyday life of Muslim women under personal laws by speaking with the women concerned rather than speaking only about them.

### **Contestations around the personal law system: where do the problems lie?**

That personal laws are problematic from a gendered point of view is not news to many readers. However, it is important to notice that although the gender aspect of the personal laws features prominently today, this was not always the case. The feminist critique of the personal laws was for a long time a minority perspective. However, due to the continuous feminist critique of the “mainstream” scholarship on the personal laws, the gendered

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<sup>17</sup>Gandhi and Shah (n 13) 267.

dimension has gained a foothold in the discourse. “Mainstream” literature on the personal laws, such as handbooks and student literature on family law or specific studies on the legal systems of the different communities, tended to restrict itself to a normative engagement with the provisions of the different personal law systems and case law emanating from the Indian higher judiciary. Popular debate, when engaging critically with the personal law system, largely focused on issues of secularism, national identity and modernity. The large amount of scholarship that exists on the issue has put the personal law system into its historical context and depicted its shaping during the colonial period and its developments since then.<sup>18</sup> In particular, it has addressed the aspect of secularism and religious identity<sup>19</sup> or compared the Indian personal law system with the legal systems in other countries,<sup>20</sup> for instance in order to suggest guidelines for the process of preparing and implementing a UCC.<sup>21</sup> While the aspect of gender equality features in some of these works, it tends to play a subordinate role.

This “gender blind spot” has been criticized by feminist scholars. Nivedita Menon very pointedly states,

[T]here always circulates in the public domain some version of the argument that, to be truly secular, India needs a UCC. But the question we must ask is, to what extent is the issue of the Uniform Civil Code about “secularism”? Is it about the relationship between religious communities and the state? Is it not really about gender-injustice – that is, the constitutionally enshrined inequality between men and women?... The fact is that all personal laws on marriage, and inheritance and guardianship of children, discriminate against women in some form or the other; surely, this should make the issue of the Uniform Civil Code visible in a different way? Should it not be debated as “India cannot claim to be truly *gender-just* as long as discriminatory personal laws exist”? However, only feminists pose the question in this way.<sup>22</sup>

Other than making the gender dimension prominent, feminist scholars have also stressed that indeed *all* personal laws contain aspects that discriminate against women. They thereby sought to disrupt the common notion that it was only Muslim personal law that was problematic from a gendered point of view. Agnes, for instance, stresses that her aim was to disrupt the notion that pits “progressive” Hindu law against “regressive-fundamentalist” Muslim law – an understanding that emerged after the reform of Hindu personal law in the 1950s.<sup>23</sup>

The feminist critique of personal laws is part of a broader set of scholarship that deals with legal norms from a critical feminist perspective or that engages critically with Indian

<sup>18</sup>Rina Verma Williams, *Postcolonial Politics and Personal Laws: Colonial Legacies and the Indian State* (Oxford University Press 2006); Partha S Ghosh, *The Politics of Personal Law in South Asia: Identity, Nationalism and the Uniform Civil Code* (Routledge 2007); Nandini Chatterjee, ‘Religious Change, Social Conflict and Legal Competition: The Emergence of Christian Personal Law in Colonial India’ (2010) 44 *Modern Asian Studies* 1147; Narendra Subramanian, *Nation and Family. Personal Law, Cultural Pluralism, and Gendered Citizenship* (Stanford University Press 2014).

<sup>19</sup>Gerald James Larson (ed), *Religion and Personal Law in Secular India: A Call to Judgment* (Indiana University Press 2001).

<sup>20</sup>Ghosh (n 18); Alamgir Muhammad Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia: A Study in Judicial Activism* (Oxford University Press 2011); Alamgir Muhammad Serajuddin, *Cases on Muslim Law of India, Pakistan and Bangladesh* (Oxford University Press 2015); Subramanian (n 18); Shimon Shetreet and Hiram E Chodosh, *Uniform Civil Code for India: Proposed Blueprint for Scholarly Discourse* (Oxford University Press 2015).

<sup>21</sup>Shetreet and Chodosh (n 20).

<sup>22</sup>Nivedita Menon, *Seeing Like a Feminist* (Penguin 2012) 151.

<sup>23</sup>Flavia Agnes, *Family Law Volume I: Family Laws and Constitutional Claims* (Oxford University Press 2011) 21. See also Williams (n 18) 15; Vrinda Narain, *Reclaiming the Nation: Muslim Women and the Law in India* (University of Toronto Press 2008) 138–39; Menon (n 22) 26. On the problematic depiction of Muslim personal law by the Indian media, see Nadja-Christina Schneider, *Zur Darstellung von “Kultur” und “kultureller Differenz” im indischen Mediensystem: die indische Presse und die Repräsentation des Islams im Rahmen der Zivilrechtsdebatte, 1985–87 und 2003* (Logos 2005).



women's situation in the broader sociolegal conditions under which they live.<sup>24</sup> Scholars who have combined an in-depth legal analysis of the personal laws with a feminist critique include, among others, Flavia Agnes, Farrah Ahmed, Indira Jaising, Ratna Kapur, Catherine A MacKinnon, Vrinda Narain, Archana Parashar and Rajeswari Sunder Rajan. Agnes and Jaising could both be described as “scholactivists” – scholars whose work is enriched with very valuable first-hand experiences from their work as practising lawyers and women's rights activists. In addition to feminist legal scholarship, legal anthropologists, such as Srimati Basu, Livia Holden, Gopika Solanki, Mengia Hong Tschalaer, or Sylvia Vatuk, have described in detail where either state institutions such as the family courts or religious dispute settlement fora such as *darul qazas* or other informal institutions create hurdles (but sometimes also opportunities) for gender equality. The critique that these scholars provide takes into account various actors. This section is thus structured along the lines of the aspects, actors or institutions that the scholars find fault with: the personal laws as such, the higher and the lower judiciary, the religious clergy as well as religious non-state dispute settlement fora.

### **The personal laws**

The critique of the personal laws is linked to some degree to their heritage. Thus, much scholarship first contextualizes the laws historically. Authors point out that while on the one hand the British colonizers exempted parts of religious law from the purview of their regulatory action,<sup>25</sup> at the same time the colonial system largely shaped the content of the personal laws as the British interfered with these laws through legislation as well as through judges' interpretation.<sup>26</sup> In fact, as Williams points out, more than 20 legislative Acts were passed between 1865 and 1939 that affected the personal laws in some form.<sup>27</sup> In addition, scholars have convincingly argued that the colonial jurisprudence led to a “Brahmanization” of Hindu personal law and an “Islamization” of Muslim personal law as well as a general rigidification of the personal laws as such.<sup>28</sup> At the same time, British concepts have found their way into the interpretation of

<sup>24</sup>In feminist literature, the personal laws thus often feature as one among many aspects, including the situation of rural, tribal or Dalit women, women's economic rights and work participation, women's right to health, women's sexuality, sex work, domestic violence and custodial rape. Publications that address the personal laws in such broader context include the following: Rajeswari Sunder Rajan, *The Scandal of the State: Women, Law and Citizenship in Postcolonial India* (Duke University Press 2003); Geetanjali Gangoli, *Indian Feminisms: Law, Patriarchies and Violence in India* (Ashgate 2007); Neera Bharihoke (ed), *Rights of Hindu and Muslim Women* (Serials 2008); Archana Parashar and Amita Dhanda (eds), *Redefining Family Law in India: Essays in Honour of B. Sivaramayya* (Routledge 2008). Kirti Singh has tackled the socio-economic components of the family laws and the gap between the law and the lived reality: Kirti Singh, *Separated and Divorced Women in India: Economic Rights and Entitlements* (Sage 2013).

<sup>25</sup>Most prominently, the Warren Hastings Plan of 1772 provided that Hindus and Muslims were to be governed by their own laws in disputes relating to inheritance, marriage, caste, and other religious usages and institutions.

<sup>26</sup>See for instance Archana Parashar, *Women and Family Law Reform in India: Uniform Civil Code and Gender Equality* (Sage Publications 1992); Werner Menski, *Hindu Law: Beyond Tradition and Modernity* (Oxford University Press 2003); Siobhan Mullally, ‘Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case’ (2004) 24 *Oxford Journal of Legal Studies* 671; Rina Verma Williams, *Postcolonial Politics and Personal Laws: Colonial Legacies and the Indian State* (Oxford University Press 2006); Rochana Bajpai, *Debating Difference: Group Rights and Liberal Democracy in India* (Oxford University Press 2011).

<sup>27</sup>Williams (n 26) 73.

<sup>28</sup>Agnes, *Family Law Volume I* (n 23) 5; Janaki Nair, ‘The Foundations of Modern Legal Structures in India’ in Raka Ray (ed), *Handbook of Gender* (Oxford University Press 2012); Serajuddin, *Muslim Family Law* (n 20) 29.

personal laws, so that the laws as in place today have been described as a “curious amalgam of religious rules and English legal concepts”.<sup>29</sup>

An extensive overview of the Indian family law from a feminist perspective and in depth critical analyses of the problematic aspects of different personal laws is provided by Flavia Agnes,<sup>30</sup> Laura Dudley Jenkins<sup>31</sup> or Archana Parashar.<sup>32</sup> They address in detail the different norms related to marriage, divorce, maintenance, inheritance, adoption and guardianship and make an effort to distinguish the many different rules and exceptions. They do not stop at criticizing triple *talaq* or polygamy among Muslims, but address the problematic features among Hindu, Christian or Parsi law, leading them to the conclusion that “[a]ll religious personal laws manage to treat women less favourably than men”.<sup>33</sup> Flavia Agnes’ two volumes on *Family Law* are worth special mention here as the author’s feminist viewpoint on the topic is definitely what makes her books stand out from regular textbooks on family law. Agnes seeks to challenge “the traditional notion that law is a neutral, objective, rational set of rules, unaffected in content and form by the passions and perspectives of those who possess and wield the power inherent in law and legal institutions”.<sup>34</sup> She understands law as being “determined by the actual practices of courts, law offices, and political stations, rather than as rules and doctrines set forth in statutes or learned treatises”.<sup>35</sup>

### **The higher judiciary**

Scholars do not only see problems with the laws themselves but also argue that the system that maintains the personal laws suffers from shortcomings. It is particularly the Indian higher judiciary that has come under the critique of feminist legal scholars in this regard.

For instance, Catherine A MacKinnon points out that while India’s jurisprudence has in some areas been quite progressive with regard to women’s rights, this has not been the case in the area of personal laws.<sup>36</sup> Even when the judges decide in a manner that is ultimately favourable for the women concerned (in cases such as *Shah Bano*<sup>37</sup> or *Danial Latifi*<sup>38</sup>), the courts usually do not ground their decision on sex equality. A similar argument is made by Indira Jaising.<sup>39</sup> She argues that the Indian courts have avoided an in-depth analysis with regard to the personal laws and have circumvented the question of discrimination in family laws, either by holding that the personal laws

<sup>29</sup>Parashar, *Women and Family Law Reform* (n 26) 307.

<sup>30</sup>Agnes, *Family Law Volume I* (n 23); Flavia Agnes, *Family Law Volume II: Marriage, Divorce, and Matrimonial Litigation* (Oxford University Press 2011).

<sup>31</sup>Laura Dudley Jenkins, ‘Diversity and the Constitution in India: What is Religious Freedom?’ (2009) 57 *Drake Law Review* 913.

<sup>32</sup>Archana Parashar, ‘Just Family Law: Basic to all Indian Women’ in Indira Jaising (ed), *Men’s Laws, Women’s Lives: A Constitutional Perspective on Religion, Common Law and Culture in South Asia* (Women Unlimited 2005).

<sup>33</sup>*Ibid* 286.

<sup>34</sup>Agnes, *Family Law Volume I* (n 23) xxvi.

<sup>35</sup>*Ibid* xxii.

<sup>36</sup>Catharine A MacKinnon, ‘Sex Equality under the Constitution of India: Problems, Prospects and “Personal Laws”’ (2006) 4 *International Journal of Constitutional Law* 181.

<sup>37</sup>*Mohd Ahmed Khan v Shah Bano Begum and Ors* AIR 1985 SC 945.

<sup>38</sup>*Danial Latifi & Anr v Union of India* AIR 2001 SC 3958.

<sup>39</sup>Indira Jaising, ‘From “Colonial” to “Constitutional”, Gender Justice and Governance’ in Indira Jaising (ed), *Men’s Laws, Women’s Lives: A Constitutional Perspective on Religion, Common Law and Culture in South Asia* (Women Unlimited 2005); Indira Jaising, ‘Gender Justice: A Constitutional Perspective’ in Indira Jaising (ed), *Men’s Laws, Women’s Lives: A Constitutional Perspective on Religion, Common Law and Culture in South Asia* (Women Unlimited 2005).



are not “laws” under the purview of Article 13, by drawing on the argument of a separation of powers and passing the ball back to the legislator, or by arguing that a specific discrimination was not based “only on the grounds of sex” as demanded by Article 15(1).<sup>40</sup> Even in cases where the women claimants “won”, the Court refused to test the specific personal law provisions against the doctrine of equality. For instance, in *Mary Roy*,<sup>41</sup> the problematic provision in the Trivancore Christian Succession Act was struck down on a technical device.<sup>42</sup> In *Madhu Kishwar & Ors v State of Bihar*<sup>43</sup> and in *Githa Hariharan*,<sup>44</sup> the Court “read down” the discriminatory provisions, rather than declaring them unconstitutional.<sup>45</sup> In a similar manner Agnes’ analysis of a vast number of decisions of the Indian higher judiciary exposes sexist and paternalistic remarks.<sup>46</sup>

MacKinnon mentions a number of potential explanations for the courts’ reluctance to engage with the constitutionality of the personal laws. One reason might be a concern that invalidating existing laws “would bring about a chaos in the existing state of law”.<sup>47</sup> Additionally, sex equality might be regarded as a Western and hegemonic idea that does not respect cultural diversity.<sup>48</sup> Lastly, across cultures the family is an area where “we encounter a pervasive and categorical reluctance to recognize sex equality rights”.<sup>49</sup> Overall, MacKinnon states, “In cases challenging sex inequality in personal laws, Indian courts appear paralyzed by the fear of being tarred by the brush of cultural insensitivity”.<sup>50</sup>

### **The lower judiciary**

While feminist scholars criticize the Indian higher judiciary for not demonstrating enough courage to interfere with the personal laws, the critique of the lower judiciary is a different one: it concerns both the procedural law as well as the (mal)functioning of the lower courts, particularly the family courts and the patriarchal and paternalistic attitudes that are present within these institutions.

Established by the Family Courts Act of 1984 as an outcome of the work of the Indian women’s movement, the objective of the family courts was that they should be easily accessible and that litigants could express their concerns to judges in “plain language”, as Basu describes.<sup>51</sup> In these courts, lawyers only appear as *amicus curiae* (“friend of the court”), while counsellors (paralegals or social workers) advise on legal issues and help clients negotiate settlements. The family court is therefore often depicted “in deliberate contrast to the impersonality of other courts, suggesting that informality equals greater comfort”.<sup>52</sup> This reform attempt was seen as a positive step by feminist scholars and a

<sup>40</sup>Jaising, ‘From “Colonial” to “Constitutional”’ (n 39) 331.

<sup>41</sup>*Mrs Mary Roy & Ors v State of Kerala & Ors* AIR 1986 SC 1011.

<sup>42</sup>Jaising, ‘Gender Justice’ (n 39) 6.

<sup>43</sup>*Madhu Kishwar & Ors v State of Bihar & Ors* AIR 1996 SC 1864.

<sup>44</sup>*Ms Githa Hariharan & Anr v Reserve Bank of India & Anr* AIR 1999 SC 1149.

<sup>45</sup>Jaising, ‘Gender Justice’ (n 39) 7.

<sup>46</sup>Agnes, *Family Law Volume I* (n 23).

<sup>47</sup>MacKinnon (n 36) 193. The author refers to the *Madhu Kishwar* case (n 43) here, where the court stated: “We would rather ... refrain from striking down the provisions as such on the touchstone of Article 14 as this would bring about a chaos in the existing state of law”.

<sup>48</sup>MacKinnon (n 36) 193.

<sup>49</sup>*Ibid* 195.

<sup>50</sup>*Ibid* 199.

<sup>51</sup>Basu (n 12) 96.

<sup>52</sup>*Ibid* 104.

way to tackle “the hostile and intimidating atmosphere within courts, endless delays, strict technicalities and the sexist-and anti-women interpretation of laws by judges”.<sup>53</sup> But not long after the establishment of the first family courts, disillusionment set in. As Agnes stresses, the courts turned out to instead preserve the institution of marriage at the expense of women than to provide for gender equality.<sup>54</sup>

This assessment is supported by a number of legal anthropologists’ studies on family courts in different parts of the country. Basu’s study of the Kolkata Family Court, for instance, depicts how counsellors and judges often see the law as “tedious, pointless, and indeed harmful” and argue for mediation and other forms of alternative dispute resolution.<sup>55</sup> This attempt to find a compromise rather than settling a case through a judgement often means that counsellors and judges push couples seeking a divorce to reconcile. Basu makes out a dominant theme that a couple’s reunion is seen as the optimal outcome of a dispute, not only for any child’s well-being but also for the woman, who might have “greater mobility or independence ... within the patched-up marriage” than she would have after divorce.<sup>56</sup> This “cultural understanding that marriage protects women ... economically, sexually, and socially” can lead to cases where women are sent back into violent relationships to secure their economic interests.<sup>57</sup>

Similar accounts can be found in Vatuk’s study on family courts in Chennai and Hyderabad<sup>58</sup> and Tschalaer’s study on the family court in Lucknow.<sup>59</sup> Vatuk states that the same paternalistic views that dominate in the Muslim clergy are to be found in the family courts, too:

[T]hose who administer the law also believe that the proper place for an adult woman is within a marital relationship and that she should do everything in her power, no matter what the cost, to ensure that she remains there. They too are inclined to consider it preferable for her to remain under the conjugal roof, whatever the quality of that relationship rather than return to her natal home or, even worse strike out on her own. This view is premised on the notion that a woman is, by definition, a dependant creature.<sup>60</sup>

In a similar fashion, Tschaler holds that the family court in Lucknow is far from value free. Her analysis of the court’s rulings shows that “Muslim women were most likely to obtain a judgement in their favour if they could successfully reiterate their subjectivity as a ‘good wife,’ ‘good mother’ and ‘good daughter-in-law’”.<sup>61</sup>

### ***Religious clergy and non-state justice systems***

Lastly, it is also the religious communities, especially the male dominated religious clergeries that are made responsible for boycotting any change to the status quo of their respective personal laws. The oppression of women by religious communities through

<sup>53</sup>Flavia Agnes, ‘Family Courts: From the Frying Pan into the Fire?’ (1990) *The Lawyers* 4, reprinted in Mary E John (ed), *Women’s Studies in India: A Reader* (Penguin Books 2008).

<sup>54</sup>Ibid.

<sup>55</sup>Basu (n 12) 92.

<sup>56</sup>Ibid 103.

<sup>57</sup>Ibid 216.

<sup>58</sup>Sylvia Vatuk, ‘Moving the Courts: Muslim Women and Personal Law’ in Zoya Hasan and Ritu Menon (eds), *The Diversity of Muslim Women’s Lives in India* (Rutgers University Press 2005).

<sup>59</sup>Tschalaer (n 7).

<sup>60</sup>Vatuk, ‘Moving the Courts’ (n 58) 47.

<sup>61</sup>Tschalaer (n 7) 150.

personal laws is illustrated, in the truest sense of the word, in Laxmi and Dasgupta's book *Our Pictures, Our Words*.<sup>62</sup> This is a selection of posters that emerged during the activism of the contemporary women's movement. The book draws on material that the publishing house *Zubaan* gathered through a project called "Poster Women". In its section on "communal politics", it reproduces pictures that show women chained to, strangled by or silenced by religion or burdened by the holy books that they carry on their backs. The power that these pictures have is impressive and demonstrates the key role that this topic played in the movement's agitation.

A feminist critique of Muslim personal law is provided by Vrinda Narain in *Reclaiming the Nation*.<sup>63</sup> She argues that the gender bias in Muslim personal law has persisted largely because the leadership of the Muslim community demands that women give primacy to their religious affiliation to the detriment of their gender identity and the state has lacked the political will to confront that leadership directly. In Narain's view,

[t]he state has accepted the equation of personal law with group identity and has not questioned this definition of group accommodation or of group interest. By allowing Muslim leaders to continue to exercise authority over women of the community by refusing to reform the personal law, together with the state's policy of reinforcing the public/private split by claiming that no change is possible in the personal law unless the call for change comes from the community itself, the state has abandoned Muslim women to patriarchal interpretations of personal law and has legitimized their continued subordination.<sup>64</sup>

Critique is also brought forward with regard to the so-called *Shariat* courts or *darul qazas* (dispute resolution fora whose decisions are based on Islamic law). Tschalaer, for instance, observes that in the *darul qaza*, "only obedient, moral, battered, and materially neglected women are deemed worthy of the *qazi*'s support".<sup>65</sup> Vatuk shows that while it might not be surprising that Muslim clerics hold paternalistic views, what surprises even more, is that these clerics have a perception of themselves as being "extremely sympathetic to and solicitous of the welfare of women.... They sincerely believe, as do other devout Muslims, that their religion is exceptional and superior to other faiths to the degree that it accords women respect and care".<sup>66</sup>

### Curing the ills: reform suggestions and women's rights activism

Having pointed out the different challenges, a second step would be to think about potential reforms or ways on how to deal with the aforementioned problems. Much of the mentioned scholarship is not merely limited to a critique of the personal law system but also makes suggestions on what needs to be done in order to tackle the shortcomings. In doing so, the literature again addresses the different actors involved: the state, the religious communities and civil society.

<sup>62</sup>Laxmi Murthy and Rajashri Dasgupta, *Our Pictures, our Words: A Visual Journey through the Women's Movement* (Zubaan 2011).

<sup>63</sup>Narain (n 23).

<sup>64</sup>Ibid 90.

<sup>65</sup>Tschalaer (n 7) 158.

<sup>66</sup>Vatuk, 'Moving the Courts' (n 58) 46.

Indeed, the fact that feminist and gendered engagements with the personal law system come from very different angles and focus on different aspects, logically means that there is not one “feminist” viewpoint on the issue, but rather a large variety of positions. While there is a general agreement on a need for reform, the suggestions on how to go about it, are manifold. In the words of Rajeswari Sunder Rajan:

The only unanimous feminist perception in the matter of the UCC is that all religions’ personal laws are at present gender-discriminatory. To some extent all women’s groups also agree that therefore these laws must change and that women must be involved in bringing about these changes. Beyond this, major disagreements divide feminist thinking on the subject.<sup>67</sup>

### ***Demanding law reforms: top-down or bottom-up?***

There is one strand of scholarship which suggests law reform as a first measure to fix the system. However, even “law reform” is a wide term that can imply different meanings. Among the manifold feminist suggestions on what such a law reform should look like, two extremes can be distinguished: the call for a UCC and the call for small-scale, community-led legal reforms. Those in favour of a UCC argue that the personal laws violate the equality provisions in Articles 14 and 15 of the Constitution.<sup>68</sup> They also draw on the directive principle in Article 44,<sup>69</sup> and stress that as long as India maintains different personal laws it cannot fulfil the preamble’s promise of secularism.<sup>70</sup> Scholars further cite the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Universal Declaration on Human Rights.<sup>71</sup>

For instance, Archana Parashar suggests the introduction of a uniform non-discriminatory law for all Indian women, which would also provide for adequate economic rights for them (maintenance, inheritance, an equal share of matrimonial property and economic independence for women after separation or divorce).<sup>72</sup> Parashar’s line of reasoning repudiates two objections: firstly, that personal laws are somewhat sacrosanct and unamendable, and secondly that personal laws should be recognized as a fact in a plurilegal system. Without undermining the importance of religion in a society, she distinguishes religion-based personal laws from religion itself. As history has illustrated,

<sup>67</sup>Sunder Rajan (n 24) 157.

<sup>68</sup>Vasudha Dhagamwar, *Towards the Uniform Civil Code* (Tripathi 1989); MacKinnon (n 36); Parashar, ‘Just Family Law’ (n 32); Poonam Pradhan Saxena, ‘Succession Laws and Gender justice’ in Archana Parashar and Amita Dhanda (eds), *Redefining Family Law in India: Essays in Honour of B Sivaramayya* (Routledge 2008); Narain (n 23) 82. Whether or not the personal laws can be tested against the equality provisions is debated. The Mumbai High Court in *The State of Bombay v Narasu Appa Mali* AIR 1952 Bom 84 held that (uncodified) personal laws were not “laws in force” within the purview of Article 13 of the Constitution and were therefore not void even when they came into conflict with fundamental rights. The Supreme Court held a different view in an *obiter dictum* in *C Masilamani Mudaliar & Ors v The Idol of Sri Swaminathaswami Thirukoil* AIR 1996 SC 1697 and also tested the personal laws in a number of cases, most recently in *Shayara Bano* (n 1).

<sup>69</sup>MacKinnon (n 36). As Narain (n 23) 84, points out, Article 44 has, indeed, “been used both to argue that the constitution makers intended to phase out personal law and introduce a UCC, as well as to argue the opposite, that Article 44 by its very presence indicates that personal law was to be continued”.

<sup>70</sup>Indira Jaising, ‘Introduction’ in Indira Jaising (ed), *Elusive Equality: Constitutional Guarantees and Legal Regimes in South Asia, Malaysia and China* (Women Unlimited 2011) 9.

<sup>71</sup>*Ibid.* It is worthwhile to note here that while India signed and ratified CEDAW in 1980 and 1993 respectively, it made reservations to specific provisions. Most importantly, with regard to Articles 5 (a) and 16 (1) of CEDAW, wherein the Indian Government declared that it ensures “these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent”.

<sup>72</sup>Parashar, ‘Just Family Law’ (n 32) 310ff.

she argues, personal laws are human-made constructs and are certainly not “immune” to change.<sup>73</sup> In her opinion, the various religion-based customs and social practices should not even be termed “law”. Rather, the “fact that people organize their lives by reference to various systems of rules” does not mean that such systems are legal systems.<sup>74</sup> Labelling these practices “law” would achieve an “implied immunity” from questioning them and may thereby legitimize gender discriminatory regimes.<sup>75</sup>

One suggestion is an *optional* Code, according to which “a sex-equal family law would be available to all religious communities at the initiative and with the consent of the women of those communities”.<sup>76</sup> Others suggest a hybrid system that combines the enactment of a UCC with a well-regulated state-recognized regime of religious alternative dispute resolution to accommodate both women’s rights and religious identities.<sup>77</sup> MacKinnon, for instance, suggests the enactment of “a uniform code of family law pursuant to Directive Principle 44 that provides for sex equality in all respects” but that is “optional at a woman’s discretion”.<sup>78</sup> This way, she argues, “[s]ex equality would not be imposed on anyone”, because women who wanted to be governed by the personal laws of their communities would be and those who wanted to choose sex equality could.<sup>79</sup> But MacKinnon also acknowledges that “[t]he downside of the proposal is, obviously, that the burden of claiming and exercising the rights is on women individually; the social coercion and community costs would be hers to bear”.<sup>80</sup>

Critique of such an optional code is brought forward by Indira Jaising who argues that an optional code alone would not suffice: “if the choice is to be meaningful at all, it must be between gender-just secular law and personal laws that comply with the requirements of equality. Unequal laws ought not be enforced by the State”.<sup>81</sup> She finds it more useful to apply Martha Nussbaum’s theory of “capabilities”<sup>82</sup> in the context of personal laws in India. “To stand the scrutiny of constitutionality, personal laws must pass a double test: that they do not violate fundamental entitlements; and that there are exit options into secular spaces”.<sup>83</sup> This test would provide “judicially manageable standards within which state action can be judged” and would thereby “remove the alibi of the courts that matters of religion and culture are not within their remit”.<sup>84</sup>

The contrary approach on the other side of the spectrum of options is the call for community led law reforms. This approach accepts legal pluralism as a fact and acknowledges the intersection of gender and religion. In Agnes’ view, “small and significant reforms within the personal laws governing minority communities have greater relevance to

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<sup>73</sup>Ibid 293.

<sup>74</sup>Archana Parashar, ‘Religious Personal Laws as Non-State Laws: Implications for Gender Justice’ (2013) 45 *The Journal of Legal Pluralism and Unofficial Law* 5, 13.

<sup>75</sup>Ibid 17.

<sup>76</sup>MacKinnon (n 36) 201. To a certain degree, such an optional code is already in place with the Special Marriage Act 1954 (SMA 1954). Here a further enlargement of the scope of the SMA 1954 has been suggested. A model for such an optional code was drafted by the *Forum Against the Oppression of Women* in the 1990s, see Nivedita Menon, ‘Women and Citizenship’ in Partha Chatterjee (ed), *Wages of Freedom: Fifty Years of the Indian Nation-State* (Oxford University Press 1998) 258.

<sup>77</sup>Farrah Ahmed, ‘Remedying Personal Law Systems’ (2016) 30 *International Journal of Law, Policy and the Family* 248.

<sup>78</sup>MacKinnon (n 36) 199.

<sup>79</sup>Ibid 200.

<sup>80</sup>Ibid 202.

<sup>81</sup>Jaising, ‘Gender Justice’ (n 39) 16.

<sup>82</sup>Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2000).

<sup>83</sup>Jaising, ‘Gender Justice’ (n 39) 16.

<sup>84</sup>Ibid.

minority women than the rhetoric of an all encompassing and overarching Uniform Civil Code”.<sup>85</sup> A UCC, she further argues, “would inadvertently situate minority women in an antagonistic relationship against their own communities, and hence may not receive the support of women from these communities”.<sup>86</sup> These scholars tend to dismiss the one-size-fits-all approach promised by “universal” human rights and favour “a more nuanced and culture specific theory of women’s rights” and “a position which is rooted within Third World realities”.<sup>87</sup> This focus on the idea of the intersection of gender and religion<sup>88</sup> fits within studies showing that “Third World women” often avoid demanding “radical social restructuring in order to achieve feminist goals” and instead “tend to opt for gradual changes that result from their collaboration with their male counterparts to enhance their communal influence vis-à-vis other members and improve living standards of their families and of the community itself”.<sup>89</sup>

The discourse around top-down or bottom-up reform approaches, that has just been described for feminist scholarship, resonates with a debate that took place among the Indian women’s movement and which has been described by scholars in the women’s and gender studies. It is interesting to see that the Indian women’s movement has undergone a significant shift in its position vis-à-vis a UCC – the “hydra-headed monster” that “raises its head every now and again and then only to be lopped off or buried”.<sup>90</sup> While in the late 1970s and early 1980s, women’s rights activists took a strong position in advocating a UCC, this position began to come under critique from the mid-1980s and early 1990s onwards when slowly but steadily most women’s groups began to prefer small-scale reforms from within the religious communities over large-scale state-led reforms.<sup>91</sup> This shift was largely seen in connection to a growing “communalization” of the topic after the *Shah Bano* case and other events.<sup>92</sup> Murthy and Dasgupta point out that “[l]ike Shah Bano, other Muslim women began to be torn between their religious beliefs, community affiliations and gender rights”.<sup>93</sup> With the communal politics of the time and the nationwide riots following the destruction of the Babri Masjid in 1992, “women’s groups were forced to rethink their strategy on demands for a UCC”.<sup>94</sup>

### ***The women’s movement’s legal activism***

Scholarship has also addressed the fact that both the Indian state as well as the religious communities are unlikely to act out of their own impulse. Rather, it is often feminist activists and women’s rights groups who initiate reform processes. Mary E John in her *Reader* on women’s studies, for instance, stresses, “No-one would contest that the law

<sup>85</sup>Flavia Agnes, ‘Minority Identity and Gender Concerns’ (2001) 36 Economic and Political Weekly 3973. Similarly, see also Anika Rahman, ‘Religious Rights versus Women’s Rights in India: A Test Case for International Human Rights Law’ (1990) 28 Columbia Journal for Transnational Law 473.

<sup>86</sup>Agnes, *Family Law Volume I* (n 23) xxvii.

<sup>87</sup>Ibid xxviii.

<sup>88</sup>Menon, *Seeing Like a Feminist* (n 22) 157.

<sup>89</sup>Ranjoo Seodu Herr, ‘Reclaiming Third World Feminism: Or Why Transnational Feminism Needs Third World Feminism’ (2014) 12 Meridians: Feminism, Race, Transnationalism 1, 5.

<sup>90</sup>Gandhi and Shah (n 13) 252.

<sup>91</sup>Mary E John (ed), *Women’s Studies in India: A Reader* (Penguin Books 2008) 494; Narain (n 23) 148.

<sup>92</sup>Mullally (n 23) 673; John (n 91) 494; Narain (n 23) 148; Flavia Agnes, ‘From Shah Bano to Kausar Bano: Contextualizing the “Muslim Woman” within a Communalized Polity’ in Ania Loomba and Ritty A Lukose (eds), *South Asian Feminisms* (Duke University Press 2012) 35; Murthy and Dasgupta (n 62) 128.

<sup>93</sup>Murthy and Dasgupta (n 62) 127.

<sup>94</sup>Ibid 128.



has been a privileged site of struggle and debate in the contemporary women's movement".<sup>95</sup> Other scholars have stressed the importance of "legal activism" in a similar fashion. For instance, Mala Khullar's *Writing the Women's Movement*<sup>96</sup> dedicates one section to the topic of women and the law. Here, the editor brings together a number of somewhat older but influential pieces of feminist scholarship addressing "legal frameworks",<sup>97</sup> "constitutional guarantees",<sup>98</sup> broader questions of "law and gender inequality",<sup>99</sup> the concept of "human rights lawyering"<sup>100</sup> or the law as a "subversive site".<sup>101</sup> Ratna Kapur's contribution in this volume puts the contemporary women's movement in a historical context by comparing how the social reform movement in the nineteenth century, women in India's independence movement and contemporary activists engaged with the law.<sup>102</sup> She states that social reformers who sought to do away with "barbaric" and "backward" practices such as *sati* and child marriage largely drew on "protective legislation for women" while maintaining the "construction of women's identities as wives and mothers within the familial sphere".<sup>103</sup> Women in the independence movement began to demand formal equality for women.<sup>104</sup> And the contemporary women's movement structured its activism around the concept of patriarchy and sought to identify and understand women's subordination and oppression.<sup>105</sup>

Legal activism also features – although to a lesser extent – in some of the contributions in Ritu Menon's<sup>106</sup> selection of very personal memoirs of the movement's protagonists. In her introduction, Menon reminds the reader that it was often specific events, campaigns and actions by the women's movement that set the grand debates about law and religion into motion.<sup>107</sup> For instance, when in 1983 Shahnaz Sheikh filed a petition challenging Muslim personal law in the Supreme Court, arguing that it violated her fundamental right to equality, a "Pandora's box" was opened up and oppositional rights claims regarding the freedom of religion, the prohibition of discrimination, community rights and the individual's rights to privacy were debated forcefully.<sup>108</sup> Some of the contributions in this volume, such as that of Indira Jaising,<sup>109</sup> or the women's organization *Saheli*,<sup>110</sup> address the movement's legal campaigns or their opposition towards religious norms and customs more specifically.

<sup>95</sup> John (n 91) 263.

<sup>96</sup> Mala Khullar (ed), *Writing the Women's Movement: A Reader* (Zubaan 2005).

<sup>97</sup> Mala Khullar, 'Legal Frameworks' in Mala Khullar (ed), *Writing the Women's Movement: A Reader* (Zubaan 2005).

<sup>98</sup> Lotika Sarkar, 'Constitutional Guarantees: The Unequal Sex' in Mala Khullar (ed), *Writing the Women's Movement: A Reader* (Zubaan 2005).

<sup>99</sup> Flavia Agnes, 'Law and Gender Inequality: The Politics of Women's Rights in India' in Mala Khullar (ed), *Writing the Women's Movement: A Reader* (Zubaan 2005).

<sup>100</sup> Nandita Haksar, 'Human Rights Lawyering: A Feminist Perspective' in Mala Khullar (ed), *Writing the Women's Movement: A Reader* (Zubaan 2005).

<sup>101</sup> Ratna Kapur, 'Subversive Sites: Feminist Engagements with the Law in India' in Mala Khullar (ed), *Writing the Women's Movement: A Reader* (Zubaan 2005).

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid* 157.

<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> Ritu Menon (ed), *Making a Difference: Memoirs from the Women's Movement in India* (Women Unlimited 2011).

<sup>107</sup> Ritu Menon, 'Introduction' in Ritu Menon (ed), *Making a Difference: Memoirs from the Women's Movement in India* (Women Unlimited 2011) xvi.

<sup>108</sup> *Ibid.*

<sup>109</sup> Indira Jaising, 'An Outsider, Inside' in Ritu Menon (ed), *Making a Difference: Memoirs from the Women's Movement in India* (Women Unlimited 2011).

<sup>110</sup> Saheli, 'Against the Odds, and often, Against the Grain' in Ritu Menon (ed), *Making a Difference: Memoirs from the Women's Movement in India* (Women Unlimited 2011).

A number of studies deal specifically with Muslim women's activism. Muslim women's groups formed as a reaction to the perceived Hindu-bias<sup>111</sup> within the early Indian women's movement and also as part of the reverberation of the *Shah Bano* case. Authors like Vatuk,<sup>112</sup> Schneider<sup>113</sup> or Tschalaer<sup>114</sup> regard these groups as part of, and influenced by a transnational discourse of Islamic feminism, which argues that the *Quran* guarantees Muslim women a number of rights that in practice are routinely denied to them due to patriarchal interpretations of Islamic law. At the same time, many of these Muslim women's organizations "remain firmly rooted in local grass-roots initiatives and they also regard themselves as an integral part of the national women's movement".<sup>115</sup>

Tschalaer<sup>116</sup> looks at Muslim women's rights activism in India by using the stories of three women's activists in the city of Lucknow and their respective women's organizations: the reformist *All India Muslim Women's Personal Law Board*, the secular *Bharatiya Muslim Mahila Andolan* and the rather conservative *Bazme Khawateen*. While none of these organizations would identify as explicitly feminist, their work can nevertheless be seen as part of the global phenomenon of "Islamic feminism", described earlier. Tschalaer depicts the activists' attempts to foster Muslim women's visibility within the public sphere, to lobby the state to secure the rights of Muslim women and to draft gender-just Islamic marriage contracts (*nikahnamas*). She shows that the activists regularly transgress boundaries by challenging "the authority of the orthodox clergy" and their "hegemonic ideas on gender",<sup>117</sup> but that they also find themselves in situations where they have to "bargain with patriarchy", meaning that they conform to patriarchal ideas of women's modesty and purity in order to secure their own legitimacy.<sup>118</sup> To Tschalaer, the women's rights activists function as what Sally Engle Merry has termed "knowledge brokers".<sup>119</sup> Being "fluent in a variety of legal languages" – Islamic laws, state-governed Muslim personal law, constitutional rights, criminal law and international human rights law – their role is to "translate" and form a bridge between these different legal worlds.<sup>120</sup> The *Quran* and the Indian Constitution are thereby not perceived as opposites, but rather in terms of their synergies.

### **Forum shopping and navigating plurilegal orders**

Scholarship also engages with the individual women that live under the personal law systems and shows how they manoeuvre through the plurilegal system, using state law as well as "do-it-yourself law" to make their claims.<sup>121</sup>

<sup>111</sup>Flavia Agnes, 'Redefining the Agenda of the Women's Movement within a Secular Framework' in Tanika Sarkar and Urvashi Butalia (eds), *Women and Right-Wing Movements: Indian Experiences* (Zed Books 1995) 138; Kumar (n 13) 106.

<sup>112</sup>Sylvia Vatuk, 'Islamic Feminism in India: Indian Muslim Women Activists and the Reform of Muslim Personal Law' (2008) 42 *Modern Asian Studies* 489.

<sup>113</sup>Nadja-Christina Schneider, 'Islamic Feminism and Muslim Women's Rights Activism in India: From Transnational Discourse to Local Movement – Or Vice Versa?' (2009) 11 *Journal of International Women's Studies* 56.

<sup>114</sup>Tschalaer (n 7).

<sup>115</sup>Schneider (n 113) 64.

<sup>116</sup>Tschalaer (n 7).

<sup>117</sup>*Ibid* 97.

<sup>118</sup>*Ibid* 86. The terminology "bargaining with patriarchy" is borrowed here from Deniz Kandiyoti, 'Bargaining with Patriarchy' in Judith Lorber and Susann A Farrell (eds), *The Social Construction of Gender* (Sage 1991).

<sup>119</sup>Tschalaer (n 7), referring to Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108 *American Anthropologist* 38.

<sup>120</sup>Tschalaer (n 7) 169.

<sup>121</sup>Basu (n 12) 9.

Gopika Solanki, as pointed out earlier, speaks about a model of “shared adjudication” in this regard.<sup>122</sup> This model, she argues, is linked to two simultaneous trends: the centralization of law (the codification of customs and policy making through legal precedents) and the decentralization of law (the fragmentation of law as there is no coherence in judgments). Her study on the adjudication of Hindu and Muslim marriage and divorce law in the city of Mumbai argues that gender equality is not necessarily brought about through more centralization. Instead, it is advanced through the (inter)action of various players and women’s possibility to “forum shop”, i.e. to choose between a variety of state and substate dispute resolution mechanisms: courts, women’s organizations, social workers, panchayats, religious institutions, family members or local “strongmen”.<sup>123</sup> By providing many options to choose from, argues Solanki (in contrast to much of the feminist legal scholarship depicted earlier), legal pluralism can actually *ensure* gender equality.<sup>124</sup> In a similar fashion, Tschalaer argues that Muslim women litigants in Lucknow may make strategic use of the different dispute resolution mechanisms “so as to maximise their chances for justice”.<sup>125</sup> In addition, Tschalaer also sees an important function of the different fora in that they provide a site where women “have the authority to speak and to narrate their experiences”.<sup>126</sup>

Srimati Basu seems to be a little more sceptical of this argument. She argues, instead, that the coexistence of multiple (quasi-) legal options is not necessarily an advantage for women. But having different possibilities for pursuing grievances also means that women must navigate between difficult choices and sometimes contradictory directives.<sup>127</sup>

### ***Setting up one’s own system: women’s courts***

Another way of evading the disadvantages of the systems currently in place, are the so-called “women’s courts” (*mahila adalat* or *mahila mandal*). These are dispute-resolution fora run by government bodies or voluntary organizations that are designed to address women’s marital and related family problems.<sup>128</sup> They aim to provide a safe and unthreatening environment in which women can air their grievances, work out satisfactory settlements with their husbands and in-laws or find ways to escape their difficult situations altogether. As shown by Basu with regard to the family court, Vatuk, however, also states that the primary goal of the women running these courts is to “reconcile” couples.<sup>129</sup> This commitment to the goal of keeping marriages intact leads Vatuk to ask “to what extent woman-only courts are able to live up in practice to the feminist principles of the NGOs that are responsible for having set them up in the first place”.<sup>130</sup> On the other hand, for Vatuk one of the most positive features of these courts is that “peer mediators are able to suggest solutions based on the realities of the women’s lives, taking into account the social and cultural context in which they live”.<sup>131</sup>

<sup>122</sup>Solanki (n 4).

<sup>123</sup>*Ibid.*

<sup>124</sup>*Ibid.*

<sup>125</sup>Tschalaer (n 7) 190.

<sup>126</sup>*Ibid.* 159.

<sup>127</sup>Basu (n 12) 183.

<sup>128</sup>Sylvia Vatuk, ‘The “Women’s Court” in India: An Alternative Dispute Resolution Body for Women in Distress’ (2013) 45 *The Journal of Legal Pluralism and Unofficial Law* 76.

<sup>129</sup>*Ibid.* 95.

<sup>130</sup>*Ibid.* 96.

<sup>131</sup>*Ibid.* 97.

In a similar fashion, Tschalaer also draws a mixed picture of the dispute settlement mechanisms that some Muslim women's organizations in Lucknow offer. While these fora are certainly less paternalistic than the *darul qazas*, their effectiveness finds its limits in the societal context: Knowing that divorce leaves many women destitute and publicly shamed, the activists frequently encourage their litigants to seek reconciliation and give their marriage "one more chance".<sup>132</sup>

## Conclusion

The fact that the personal law system is problematic from a gendered perspective is not news. During the last decades, feminist scholarship has succeeded in largely influencing the mainstream discourse in this regard and has made people more gender sensitive when thinking about law and religion. At the same time, the literature presented here shows that neither can the problems easily be pinned down to one specific aspect nor are there easy solutions to the conflicts that arise in this area. Personal laws remain a highly contested topic and different interests and identities play out in the debate around them.

One aspect that falls rather short in the literature – especially when compared with the scholarship in other countries – is that of feminist litigation in the area of personal laws. As pointed out earlier, the *Shayara Bano* case was not only initiated by a number of Muslim women who attempted to bring about a landmark decision, but it was also supported by a number of women's rights groups who, with this case reinitiated a broader debate about personal laws and gender (in)equality. Thereby, the case stands in a line of other cases, where bold women (including Shah Bano, Mary Roy and many others) or activist lawyers such as Indira Jaising or Flavia Agnes have used the courts as vehicles for social change – a phenomenon that in the Canadian and US-American literature is largely studied under the key words of "strategic litigation", "cause lawyering", "feminist lawyering" or "women's rights litigation".<sup>133</sup> In India, scholarship has indeed engaged extensively with activist judges and Public Interest Litigation (PIL). However, few projects have studied those activists or lawyers that actually bring the cases before the courts.<sup>134</sup> And there is indeed a lack of literature when it comes to feminist litigation vis-à-vis the personal law system.

Some of the aforementioned scholars touch upon the issue briefly. Serajuddin focuses on judicial activism and evaluates as to how far judges *make* law in the area of Muslim personal law, rather than just interpreting it,<sup>135</sup> but he doesn't actually engage with the question of who brings the cases before the courts in the first place. Subramanian points

<sup>132</sup>Tschalaer (n 7) 163.

<sup>133</sup>Particularly on the impact of women's rights activists on courts, see Karen O'Connor and Lee Epstein, 'Beyond Legislative Lobbying: Women's Rights Groups and the Supreme Court' (1983) 67 *Judicature* 134; Tracy E George and Lee Epstein, 'Women's Rights Litigation in the 1980s: More of the Same' (1990–1991) 74 *Judicature* 314; FL Morton and Avril Allen, 'Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada' (2001) 34 *Canadian Journal of Political Science* 55; Christopher P Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (UBC Press 2004); Holly J McCammon and Allison R McGrath, 'Litigating Change? Social Movements and the Court System' (2015) 9 *Sociology Compass* 128.

<sup>134</sup>See, however, the studies by Arvind Narrain and Arun Thiruvengadam, 'Social Justice Lawyering and the Meaning of Indian Constitutionalism: A Case Study of the Alternative Law Forum' (2014) 31 *Wisconsin International Law Journal* 525; Avani Mehta Sood, 'Gender Justice through Public Interest Litigation: Case Studies from India' (2008) 41 *Vanderbilt Journal of Transnational Law* 833. Sood argues that "the PIL vehicle has great potential for advancing gender justice" if used strategically by women's rights advocates and promoted by the courts.

<sup>135</sup>Alamgir Muhammad Serajuddin, *Muslim Family Law and Cases on Muslim Law* (n 20).

out that landmark court decisions were often initiated or supported by civil society organizations and women's groups.<sup>136</sup> He writes: "The growth in civil society mobilization, the increased attention of rights organizations to litigation and legal policy, and the experience of the emergency led certain judges in the higher courts to support the rights of weaker groups sporadically".<sup>137</sup> According to Subramanian, it was the minority communities in particular that were active in pushing for reform through case law: Muslim women challenged the validity of *talaq*, the economic consequences of divorce or the validity of polygamy<sup>138</sup> and Christian women litigated the conditions under which divorce would be accessible and the possibilities of adoption.<sup>139</sup> Whether and under what conditions Indian women's groups who pursue litigation are successful on a large scale would be an interesting field of research to delve into.

It would also be interesting to investigate whether the Supreme Court has entered a new era of personal law jurisprudence in the wake of the *Shayara Bano* case. With the Court's rather clear stance in the triple *talaq* judgement, the aforementioned critique of the Supreme Court practising a "hands off"-approach might not be entirely accurate anymore. At the same time, even within this landmark judgement, the gender aspect fell rather short.<sup>140</sup> Although Articles 14 and 15 did feature, the judgement did not engage with the intersectionality of gender and religious identity and ultimately the Court seemed less concerned with women's rights, but rather with the preservation of marriage, when it found fault with triple *talaq* on the basis that "the marital tie can be broken capriciously and whimsically by a Muslim man without any attempt at reconciliation so as to save it".<sup>141</sup> Feminist legal scholarship that critically assesses the Indian jurisprudence and points to its shortcomings thus stays as important as it always was.

*Shayara Bano* has also produced a new discourse on law reform. This has its positive aspects when it produces attempts to critically reevaluate those laws that discriminate against women or draw on patriarchal and paternalistic understandings. After the judgement, the Indian blogosphere produced a large amount of articles that used the *Shayara Bano* case as a starting point to think critically about other legal areas, such as other personal laws<sup>142</sup> or the Indian rape law.<sup>143</sup> However, the judgement has also provoked some highly alarming developments when Hindu nationalists and the political right now attempt to criminalize the pronouncement of *talaq* with imprisonment.

<sup>136</sup>Subramanian (n 18).

<sup>137</sup>Ibid 141.

<sup>138</sup>Ibid 214.

<sup>139</sup>Ibid 215.

<sup>140</sup>Ratna Kapur, 'Triple Talaq verdict: wherein lies the much hailed victory?' *The Wire* (28 August 2017) <<https://thewire.in/171234/triple-talaq-verdict-wherein-lies-the-much-hailed-victory/>> accessed 16 February 2018; Jhuma Sen, 'The gender question' *Frontline* (15 September 2017) <<http://www.frontline.in/the-nation/the-gender-question/article9834658.ece>> accessed 16 February 2018.

<sup>141</sup>*Shayara Bano* (n 1) [57]. On this argument, see Kapur (n 140).

<sup>142</sup>Subhashini Ali, 'The triple talaq ruling is a step forward, but there is a long way to go for gender justice laws' *The Wire* (24 August 2017) <<https://thewire.in/170364/triple-talaq-uniform-civil-code-gender-justice/>> accessed 16 February 2018; Shalaka Patil, 'After triple talaq, a look at the other discriminatory personal laws that need to go' *The Wire* (28 August 2017) <<https://thewire.in/171451/personal-law-reform-gender/>> accessed 16 February 2018; Narendra Subramanian, 'Beyond triple talaq, India needs a debate on how to reform Muslim, Hindu law' *The Wire* (27 June 2017) <<https://thewire.in/151585/democratising-family-nation-triple-talaq-pluralistic-equality/>> accessed 16 February 2018.

<sup>143</sup>Maya Mirchandani, 'Triple talaq and marital rape: politics and patriarchy trump gender justice' *The Wire* (31 August 2017) <<https://thewire.in/172469/triple-talaq-marital-rape-patriarchy-politics-gender-justice/>> accessed 16 February 2018.

That arguments of gender equality are misused in order to fuel anti-Muslim sentiments is a worrying phenomenon that we do not only see in India but also in Europe.<sup>144</sup> Scholarship that delves into this phenomenon is much needed.

## Acknowledgements

The author would like to thank the two anonymous reviewers whose critical comments and feedback have helped to improve this text.

## Disclosure statement

No potential conflict of interest was reported by the author.

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<sup>144</sup>Sara R Farris, *In the Name of Women's Rights: The Rise of Femonationalism* (Duke University Press 2017); Sabine Hark and Paula-Irene Villa, *Unterscheiden und herrschen: ein Essay zu den ambivalenten Verflechtungen von Rassismus, Sexismus und Feminismus in der Gegenwart* (Transcript 2017).